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No. 78-1853

In The
Supreme Court of The United States
October Term, 1979

McDONNELL DOUGLAS CORPORATION,

Petitioner,

— against —

GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents respectfully urge that the above-styled petition for a writ of certiorari presents no "special and important reasons" (U.S. Sup. Ct. Rule 19, 28 U.S.C.A.) why the Court should exercise its discretion to accept this matter for review. To the contrary, the opinion of the Ninth Circuit Court of Appeals[1] neither conflicts with any other decision of another court of appeals nor decides an important and novel question of federal law, the only criteria among those enumerated in Rule 19.1(a) which petitioner appears to rely on to support its request for review.

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[1] The Ninth Circuit's opinion is now officially reported at 594 F.2d 720.

STATEMENT OF THE CASE

The present case concerns the manner in which respondent General Telephone Company of California ("GTC") charged petitioner McDonnell Douglas Corporation for Centrex telephone service supplied to certain of petitioner's California facilities. During the period at issue, GTC's manner of charging for Centrex service affected the amount of federal communications excise tax imposed in respect of such service.

Centrex is a type of dial Private Branch Exchange ("PBX") telephone service used by large businesses and other organizations. In addition to the usual ability to place and receive calls into and from the world-wide telephone network, telephones (or "stations") in a Centrex system such as that furnished to petitioner may also reach directly any other station within the Centrex system.[2] At all times, GTC's charges for all aspects of Centrex service were governed by tariffs on file with the California Public Utilities Commission.

Originally the federal communications excise tax applied to all local and toll telephone service. However, the Excise Tax Reduction Act of 1965 (the "1965 Act"), 79 Stat. 136 (1965), exempted "private communication service" from the federal communications excise tax beginning January 1, 1966. The 1965 Act provided however that a communication service would not qualify as a tax-exempt "private" communication service "unless a separate charge is made for such service." 79 Stat. 146 (1965), 26 U.S.C. § 4252(d). The Congressional reports on the 1965 Act stated:

[2] There are other discrete incidents and features of Centrex service, such as the ability to arrange conference calls among more than two stations within the system, but they are not material to any issue now presented.

"For the reasons indicated above, your committee's bill provides an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems — where the switching equipment is generally on the premises of the local exchange rather than on that of the subscriber — generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such a separation is made, this exemption therefore, will not apply in the case of Centrex service." H.R. Rep. No. 433, 89th Cong., 1st Session 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677.[3]

Until August 10, 1971, the applicable GTC tariff on file with the California Public Utilities Commission did not provide for separate charges for the intraoffice or "private" communication portion of Centrex service. There was a single monthly charge for each Centrex station covering the use of that station both for intraoffice communications within the Centrex system and for local telephone service.[4] Accordingly, until August 10, 1971 GTC collected federal excise tax from petitioner on the entire Centrex station rate for Centrex service. Effective August 10, 1971, a new Centrex tariff filed by GTC did separately state charges for Centrex intraoffice communication service, and since that date petitioner has not paid federal excise tax on such service.

[3] The language of the Senate Report in this respect is identical. S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726-27.

[4] Charges for long distance (or "toll") telephone calls are tariffed and billed separately, and do not play any part in the present dispute.

Petitioner contends that GTC was obligated to revise its Centrex tariff as soon as possible after the passage of the 1965 Act, so as to qualify petitioner for the exemption from tax on the private communications portion of its Centrex service. By failing to act to effect the tariff revision as quickly as petitioner would have liked, it is claimed that GTC discriminated unlawfully against petitioner as contrasted with users of other types of PBX systems who qualified immediately for the exemption afforded by the 1965 Act.

QUESTION PRESENTED

Did the courts below correctly conclude that GTC's practice with respect to the imposition and collection of charges for the private communication portion of Centrex service falls outside the coverage of the Federal Communications Act?

REASONS FOR DENYING THE WRIT

Petitioner argues that the opinion of the Ninth Circuit erroneously restricts the jurisdictional reach of the Federal Communications Act of 1934 (the "Communications Act"), 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151-223. The Ninth Circuit concluded that GTC's practice with respect to the manner of combining or separating — in its tariffs filed with the California Public Utilities Commission — charges for the private communication portion of Centrex service was a matter concerning intrastate communication service. The court thus held that the subject was excluded from the coverage of the Communications Act by the express terms of section 2(b), as amended, 47 U.S.C. § 152(b).

The Communications Act evinces a clear Congressional intent to reserve to the states exclusive jurisdiction

over intrastate telephone services. Section 2(b) of the Communications Act, 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 152(b), provides in pertinent part:

> "Subject to the provisions of section 301 of this title [not applicable here], nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."

Section 221(b) of the Communications Act, 48 Stat. 1080 (1934), as amended, 47 U.S.C. § 221(b), reserves to the states jurisdiction over telephone exchange service, *even though a portion of such service constitutes interstate communication:*

> "Subject to the provisions of section 301 of this title [not applicable here], nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

The legislative history of the Communications Act confirms that these provisions were intended to reserve "to the States exclusive jurisdiction over intrastate telephone and telegraph communication." S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934). As Senator Dill, the Senate manager of the bill that became the Communications Act, explained:

"We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called 'State regulation' amounts to very little.

"We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State Commission, the provisions of the bill shall not apply. . . ." 78 Cong. Rec. 8823 (1934).

Petitioner argues that there is a sufficient interstate communication nexus to its claim by virtue of the fact that Centrex stations may be interconnected with the interstate telecommunications network. This contention was disposed of by a footnote in the Ninth Circuit's opinion,[5] and plainly has no merit.

The Federal Communications Commission (the "Commission"), with respect to terminal equipment and so-

[5] 594 F.2d at 724 n.3, which states: "We are also unpersuaded by McDonnell's contention that CENTREX is not intrastate service because of the capacity it possesses to be patched into interstate telecommunications nets. Aside from the apparent fact that none of the disputed charges here were for calls made from CENTREX phones into interstate nets, the theory which McDonnell tries to develop is inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services. If CENTREX service of the type described here becomes interstate merely because it can be connected with other wire systems that are interstate, then it is difficult to imagine what type of telephone service would not qualify as interstate in a similar manner. The lessons of *Kitchen* [*Kitchen v. F.C.C.*, 464 F.2d 801 (D.C. Cir. 1972)] and *State Corporation Comm'n* [*United States v. State Corporation Comm'n*, 345 F. Supp. 843 (E.D. Va. 1972), *aff'd* 409 U.S. 1094 (1973)] *supra*, suggest McDonnell's argument should be discarded, and we do so in light of the facts presented here."

called interconnect equipment capable of facilitating both intrastate and interstate communication services, has sought to regulate such facilities only where it has proven difficult or impossible to separate the two types of communications. *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976) (facilities found to be "used in common and indivisibly," 45 F.C.C.2d at 215); *U.S. Dept. of Defense v. General Telephone Co. of California*, 38 F.C.C.2d 803, *aff'd sub nom. St. Joseph Telephone & Telegraph Co. v. F.C.C.*, 505 F.2d 476 (D.C. Cir. 1974); *AT&T-TWX*, 38 F.C.C. 1127, 1133 (1965) ("a single unified regulation pattern" was found to be "essential" in a system with vital national functions and no substantial and important local capabilities, 38 F.C.C.2d at 813-815). In *People of the State of California v. F.C.C.*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), the court upheld the Commission's refusal "to assert jurisdiction over those purely local services that could be practically separated from interstate services supplied through the same facilities. The Commission refused to assert authority over local exchange service, leaving any regulation over such service to the appropriate state bodies." 567 F.2d at 86.

In *North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), the Fourth Circuit also has confirmed this view of the division of jurisdiction accomplished by the Communications Act. The court observed that it had "no doubt that the provisions of section 2(b) [of the Communications Act, as amended, 47 U.S.C. § 152(b)] deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." 537 F.2d at 787. The court found that the

legislative history of the Communications Act established that "the purpose of section 2(b) is to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." 537 F.2d at 794 n. 6.

The very nature of the present dispute demonstrates convincingly that the practice which gave rise to petitioner's claim is necessarily and conveniently separable from any aspect of interstate communication service. That portion of Centrex service which petitioner contends should have been separately charged for so as to provide exemption from excise tax is carved out by the 1965 Act itself as "private communication service." To the extent any communication service facilitated by a Centrex system constitutes interstate communications, it would not be "private communication service" and therefore petitioner would not have been exempt from excise tax in any event.

What is more, in the proceedings below petitioner lacked and expressly disclaimed any interest in attempting to show any attributes of or effects on interstate communications arising from the disputed practice. Thus, before the District Court petitioner stated "categorically that its [position] is not concerned with rates, the jurisdiction of the FCC or any other public utility commission and is not based on any allegation that Centrex is interstate communications." R. 376, lines 28-31.[6] The disclaimer apparently results from the fact that throughout the proceedings in this case, petitioner has stubbornly clung to the mistaken position that because GTC has been

[6] The designation "R. 376, lines 28-31" is to page 376 of the Clerk's Record on appeal to the Ninth Circuit, a copy of which is attached hereto as Appendix A.

determined to be a "carrier" within the meaning of the Communications Act for certain purposes,[7] all of the provisions of the Communications Act always apply to all of GTC's activities. What petitioner has failed to perceive is that section 2(b)(1) of the Communications Act, as amended, 47 U.S.C. § 152(b)(1), excludes from the application of the Communications Act those activities of "carriers" that are intrastate in nature, even though other activities of the "carrier" may be subject to the provisions of the Communications Act. *See, e.g., National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 533 F.2d 601, 607-08 (D.C. Cir. 1976) (opinion of Wilkey, J.).[8]

[7] Citing *General Telephone Co. of California v. F.C.C.*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969) and *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (6th Cir. 1962).

[8] Nor does the fact that the practice in question affected petitioner through the means of the federal excise tax somehow invest the dispute with an interstate or federal character. In *Carrigan v. Sunland-Tujunga Telephone Co.*, 263 F.2d 568 (9th Cir.), *cert. denied*, 359 U.S. 975 (1959), the appellant argued that the definitions of local and toll telephone services for purposes of the intrastate telephone rates established by state regulatory authorities are required to conform to the federal communications excise tax definitions of the same terms. The Ninth Circuit rejected that argument:

> "The fundamental legal question with respect to appellant's alleged claim is whether §§ 4251, 4252 and 4254 of the Int. Rev. Code limit state utilities commissions in establishing schedules for intrastate telephone calls.
>
> "The district court judge concluded they do not. We agree.
>
> "The Internal Revenue Code imposed federal taxes, as it had a right to do. The Commission fixed the telephone rates as it had a right to do. The Commission's rates had nothing to do with the federal tax and the federal tax had nothing to do with fixing the rates, but was on them as fixed." 263 F.2d at 571.

That holding represents an application of the general principle that "[s]tate law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940).

CONCLUSION

The decision of the Ninth Circuit correctly applied the express language of the Communications Act, was fully consonant with the intentions evidenced by the legislative history of the Communications Act, conformed to the Commission's own interpretation and application of the Communications Act, and is supported by the decisions of other courts of appeal that have considered the same or similar issues. Petitioner has failed to make out any "special and important" reasons why this Court should undertake to reexamine the Ninth Circuit's disposition of this matter.

Respectfully submitted,

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Appendix A

Several sections such as Sections 201, 203, 204 and 205 do speak to Commission (FCC) authority. Section 202 does not. Section 206, upon which Plaintiff relies, speaks to "carrier's liability for damage" and states that "In case any common carrier" violates the prohibitions of this chapter, such "common carrier" shall be liable to the person or persons injured thereby for the full amount of damages sustained. This section does not speak to authority of the Commission nor is it limited to interstate communications.

Section 207 entitled "Recovery of damages" states that "any person claiming to be damaged by any common carrier may bring suit . . . in any district court of the United States of competent jurisdiction" or "make complaint to the Commission." Once again, this statute refers to common carriers and specifically grants jurisdiction to the District Court without "Commission" involvement. The law is clear. The facts as they relate to the law are undisputed. "Centrex service offered by General Telephone Company is a type of dial private branch exchange ("PBX") service." [Affidavit of Richard L. Hester in Support of Motion for Summary Judgment, Para. 3, p. 2.]

As a Centrex "PBX" user, Plaintiff was charged federal excise tax disproportionately to other PBX users and were damaged thereby. Defendants have stretched and strained in their Statement of Proposed Genuine Issues and in their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment to stylize Plaintiff's Motion as being a rate matter, a matter for factual determination by the Commission, and raising a question as to what is interstate communications. Plaintiff hereby states categorically that its Motion is not concerned with rates, the jurisdiction of the FCC or any other public utility commission and is not based upon an allegation that Centrex is interstate communications. Plaintiff submits that clearly this Court has jurisdiction under

2.

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